THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DEVLIN HILLMAN,	)	
Employee	)	OEA Matter No. 1601-0100-16
	)	
v.	)	Date of Issuance: November 16, 2018
	)	
D.C. DEPARTMENT OF PARKS & RECREATION,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
	)	

Kemi Morten, Esq., Employee Representative
Janea Hawkins, Esq., Agency Representative

INITIAL DECISION

On September 22, 2016, Devlin Hillman ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Department of Parks and Recreation's ("DPR" or the "Agency") adverse action of removing him from service. Employee's last position of record with DPR was Recreation Specialist (Lifeguard). Of note, Employee was also serving as Chief Shop Steward for American Federation of Government Employees ("AFGE") Local 2741 at all relevant times prior to his removal from service. By notice dated August 24, 2016, Employee was served DPR's Final Decision on Proposed Removal. In this notice, DPR cites the following, in pertinent part, to explain and substantiate its adverse action:

> The removal action, which was proposed in accordance with section 1608 of Chapter 16… 1603.3(f)(4): Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: specifically, insubordination: includes the refusal to comply with direct orders, accept an assignment or detail; and carry out assigned tasks.

The appeal process, to date, has been tedious in that the parties were in settlement talks for an extended period that was ultimately fruitless. Further, they have participated in an extended

period of Discovery in order to collect relevant information from named witnesses who were either reluctant to testify or who had relocated out of the Washington Metropolitan area. This process was further lengthened due to the Undersigned having been involved in a serious motorcycle accident which necessitated several months of time out of the office to recuperate. As this process unfolded, two salient issues require disposition to bring this matter to resolution. Whether DPR used the proper iteration of the District Personnel Manual in coming to a legally appropriate description of the deleterious conduct that gave rise to the instant appeal. Also, whether the OEA may exercise jurisdiction over this matter since Employee (allegedly) was working in an at-will capacity due to his extended failure to become properly licensed for his profession. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

As will be explained below, the OEA lacks authority to adjudicate this matter.

ISSUE

Whether this matter should be dismissed.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states:

> "The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. 'Preponderance of the evidence' shall mean:
>
> > "That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue."

OEA Rule 628.2, *id.*, states:

> "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues."

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Agency, in its Brief Regarding Jurisdiction, contends that Employee converted from Career Service to At-Will employment when he failed to pass all components of the International Lifeguard Training Program ("ILTP"). It is uncontroverted that DPR provided Employee and his similarly situated colleagues more than one year of advanced notice that continued employment was contingent on passing this new certification course. It is also not subject to genuine dispute that DPR provided classroom based training and instructional materials for this new course. This

training opportunity was provided free of charge with time to learn and study during these employees' tour of duty. Agency further asserts that consistent with prior decisions from this Office and the District of Columbia Court of Appeals, that employees who fail to obtain or maintain proper certification for their positions of record forfeit the protections offered to Career service employees. These employees are instantly converted to at-will status with no legal right to appeal their termination to the OEA.[1]

DPR notes that it served Employee with a July 18, 2016, Advance Written Notice of Proposed Removal informing him that his removal was being proposed for the following charge: Any On-Duty or Employment-Related Act or Omission that interferes with the Efficiency and Integrity of Government Operations: specifically, "Insubordination" for refusing to take and pass the International Lifeguard Training Program ("ILTP") course online and on other occasions as ordered. Of note, Employee was charged with three separate instances of this charge in a futile effort at rehabilitation.[2] The first two offense for this conduct involved suspensions of five (5) days and nine (9) days. Agency further notes that Employee's arguments fail to provide any credible authority that would prohibit it from changing the certification provider from the American Red Cross to the ILTP.[3]

Employee contends that the offense of "Insubordination" had been repealed five months prior to his removal on February 25, 2016. Given as much, Employee asserts that the Agency cannot sustain the instant removal action. Employee also argues that the Collective Bargaining Agreement ("CBA") in effect at the time of his removal prevents the DPR from implementing a new licensing requirement without prior Union consultation and approval. Moreover, the CBA, allegedly requires the Agency to inform it that they intend to initiate adverse action within 45 business days of when they knew of the allegation(s) supporting the charge.[4]

In defense of the aforementioned allegations, DPR explains as follows:

> Since the end of 2015, the Agency has offered approximately two (2) ILTP trainings per month at no cost for its lifeguards and the Agency has allowed all of the lifeguards to participate in training during their paid tours of duty. Trainings involve 24 hours of instruction and testing and run for three (3) days for eight (8) hours a day.[5]

DPR asserts that the issues relating to DPR's ability to implement a new licensing requirement were pled and settled as part of an Unfair Labor Practice complaint filed at the Public Employee Relations Board.[6] DPR further asserts that issues regarding unfair labor claims

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[1] *See, Donald Frazier v. D.C. Public Schools*, OEA Matter No. 1601-0161-12R17, Initial Decision on Reman (December 21, 2017); *See also, Gizachew Wubishet v. D.C. Public Schools*, OEA Matter No. 1601-0106-06, Opinion and Order on Petition for Review (June 23, 2009).
[2] Motion to Dismiss, or in the Alternative Motion for Summary Disposition at Tabs 2, 3 and 4 (October 28, 2016).
[3] *See* Agency Brief Regarding Jurisdiction at 8 (April 3, 2018).
[4] Of note, I find that as a duly elected Chief Shop Steward of AFGE, Employee was within Union management and as such, notice to him (even for a charge involving him) constitutes notice to the Union. This peculiar finding only applies when Union management personnel are personally charged for misconduct, which is the case in this matter.
[5] Motion to Dismiss, or in the Alternative Motion for Summary Disposition at 3 (October 28, 2016).
[6] *Id*. at Exhibit E.

are under the purview of the PERB not the OEA. Included within the documents of record is a copy of the settlement agreement which I find assures that DPR has the authority to change the licensing requirement for Recreation Specialists (Lifeguards) under its employ.[7] DPR contends that it chose to charge Employee with Insubordination pursuant to the former iteration of the District Personnel Manual because it was involved in Impact and Effects Bargaining ("I&E") with AFGE. Accordingly, newer versions of the DPM cannot be utilized until those terms are agreed upon through the I&E process.

I agree with DPR's contention that the appropriate choice of charge in this matter was subject to the I&E process. I further find that since AFGE was involved in I&E with the Agency, that the charge of Insubordination is allowable in this matter.

DPR also asserts that pursuant to D.C. Official Code § 1-617.08, its management regime retained the sole right, within applicable laws, rules and regulations, to directs its employees.[8] Agency further explained that its licensing requirement change from the American Red Cross to the ILTP was in response to a change in the Department of Health's regulations that would have made Agency lifeguards, who were only American Red Cross licensed, out of compliance with the new standards set forth by the Department of Health.[9] In order to avoid that scenario, Agency implemented the licensing change to ILTP. Given the instant facts, I find that DPR was within its managerial right to change the licensing requirement for Employee and his colleagues. Agency further notes that in compliance with CBA, it gave ample notice (more than a year) and training to affected employees before it implemented the licensing change.[10] Agency further notes that slightly more than 97% of the affected employees passed the new licensing requirement thereby avoiding the instant adverse action that Employee herein is contesting.

Lack of Licensure

Employee admitted that he lacks ILTP certification. Employee contends that the ILTP is unnecessary to his being able to properly perform his on-the-job duties. *Gizachew Wubishet v. District of Columbia Public Schools*[11], involved a teacher whose provisional teachers license had expired and he had been unable to obtain a permanent teachers license prior to his removal from service. Therein, I found that "the Employee did not fully complete the certification requirements [of his position] and [failed to] obtain his license by June 30, 2006, and once his provisional license expired, he served solely in an "at will" capacity, subject to Agency's determinations with regard to whether he qualified for continued employment." *Id.* at 3. *Wubishet* was upheld by the Board of the OEA in an Opinion and Order on Petition for Review[12] wherein the Board of the OEA held that because of his lack of proper licensure, *Wubishet* was in an at-will employment status with no attendant appeal rights to the OEA.[13] Likewise, I find that in this matter, Employee herein did not fully complete the certification requirements necessary to obtain his license by the effective date of his removal from service. Accordingly, I find that he

[7] *Id.*
[8] Agency's Sur-Reply Brief Regarding Jurisdiction at 2 (June 14, 2018).
[9] *Id.* at 3 – 4.
[10] *Id.*
[11] OEA Matter No. 1601-0106-06, (March 23, 2007).
[12] OEA Matter No. 1601-0106-06, (June 23, 2009).
[13] *See generally*, *Id.* at 3.

served solely in an "at will" capacity, subject to Agency's discretion with regard to whether he qualified for continued employment. It is well established that in the District of Columbia, an employer may discharge an at-will employee "at any time and for any reason, or for no reason at all". *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (D.C. 1991). *See also Bowie v. Gonzalez*, 433 F.Supp.2d 24 (DCDC 2006). As an "at will" employee, Employee did not have any job tenure or protection. *See* D.C. Official Code § 1-609.05 (2001). Further, as an "at will" employee, Employee had no appeal rights with this Office. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991).

I also find that "Insubordination" constitutes an appropriate basis for adverse action against the Employee who, for whatever reason, failed to become ILTP certified by the deadline(s) afforded by the Agency. I further find that Employee had a duty to become ILTP certified by the deadline(s) both because the duty was set forth as a by several DPR memoranda to become ILTP certified. Further, his failure to become certified, despite the fact that he was provided with ample time to do so and that DPR provided him with the necessary training to become certified is inexplicable.

It is regrettable that the Agency elected to not grant this Employee a further extension of time to finalize the earning of his credentials and licenses. However, given the instant circumstances, Agency's decision is beyond my jurisdiction to set aside, based upon Agency's decision regarding how it will address the continued non-licensure status of its "at will" employees who were nearing, but still had not completed all of the certification requirements.

Conclusion

Considering the discussion above, I find that Employee has failed to meet his burden of proof regarding the OEA's ability to exercise jurisdiction over the instant matter.[14] Accordingly, I CONCLUDE that I must dismiss this matter for lack of jurisdiction. [15]

ORDER

Based on the foregoing, it is hereby **ORDERED** that this matter be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

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[14] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence"). Inter alia, this is most pertinent to the numerous CBA violations lodged by Employee.

[15] Since I have found that he OEA lacks jurisdiction over this matter, I am unable to address the factual merits, if any, contained within Employee's petition for appeal.

ERIC T. ROBINSON, Esq.
Senior Administrative Judge